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No. 01—

IN THE

Supreme Court of the United States

UNISYS CORPORATION,
Cross-Petitioner,

v.

FREDERICK E. TONNIES, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there are "class action exceptions" to the summary judgment procedures prescribed in Federal Rule of Civil Procedure 56 and to the "pleading fraud with particularity" requirement of Federal Rule of Civil Procedure 9(b).

In this ERISA class action, defendant Unisys Corporation made a well-supported motion for summary judgment with respect to that portion of the class that retired more than six years before the filing of the action. Unisys relied on ERISA's six-year statute of repose. Plaintiffs alleged that "fraud or concealment" tolled the running of the six-year period. The issues presented are: (a) whether "specific facts" must be set forth as to each plaintiff opposing summary judgment, or whether all class members can avoid summary judgment on the basis of "specific facts" relevant to only a few; and (b) whether fraud must be pleaded with particularity as to each plaintiff under Rule 9(b).

PARTIES TO THE PROCEEDING

The Cross-Petitioner is Unisys Corporation. The Cross-Respondents are Frederick E. Tonnies, William Leonhardt, David S. Kahl, Robert E. Wilt, Clay A. Bernichon, Solveig Tschann, Fredrick W. Hoppe, Ludson F. Worsham, Edwin Marjala, Kenyon T. Bement, Donald E. Wagner, Lucius O. Browne, Donald F. Fabry, Thomas L. Durkin and Bernard J. Hart, individually and on behalf of members of the Sperry and Burroughs Classes who retired from the Company more than six years before the filing of their claims.

RULE 29.1 STATEMENT

Unisys Corporation has no parent. Its subsidiaries, other than wholly-owned subsidiaries, are Nihon Unisys, Ltd. and Oku Unisys Kaisha, Ltd.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner Unisys Corporation, by its undersigned counsel, respectfully cross-petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 242 F.3d 497 (3d Cir. 2001). The opinion of the district court granting summary judgment in favor of Unisys on Cross-Respondents' breach of fiduciary duty claims (Pet. App. B) is reported at 957 F. Supp. 628 (E.D. Pa. 1997).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 9, 2001. Cross-Respondents' petition for rehearing *en banc* was denied on May 30, 2001. Cross-Respondents filed a Petition for a Writ of Certiorari, which was docketed on August 29, 2001. Pursuant to this Court's Rule 12.5, Unisys

has filed this Cross-Petition within 30 days of the date of the docketing of Cross-Respondents' Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are: (1) Federal Rule of Civil Procedure 9; (2) Federal Rule of Civil Procedure 23; (3) Federal Rule of Civil Procedure 56; and (4) 29 U.S.C. § 1113. They are reproduced in the appendix at App. 1a-8a.

STATEMENT OF THE CASE

Factual Background And Procedural History

In September 1986, Sperry Corporation and Burroughs Corporation merged to form Unisys Corporation. Prior to the merger, both Sperry and Burroughs provided their retiring employees with post-retirement medical coverage at little or no cost to the retiree. Unisys continued to maintain the pre-merger benefits under the separately-established Sperry and Burroughs plans after the merger, but also created a new Unisys plan for employees who retired after April 1, 1989. Pursuant to the disclosure requirements set forth in the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), Sperry, Burroughs, and later Unisys, provided all retirees with summary plan descriptions ("SPDs") that accurately explained the terms of the post-retirement medical benefit plans. As both the district court and the court of appeals have acknowledged, these SPDs unambiguously reserved to the company the right to amend or terminate the medical benefit plans at "any time" or for "any reason."[1] A typical reservation of rights clause provided:

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[1] Under ERISA, an employer has a statutory right "for any reason at any time, to adopt, modify or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Plan Continuation

> The Company expects to continue the Plans, but reserves the right to change or end them *at any time*. The Company's decision to change or end the Plans may be due to changes in federal or state laws governing welfare or retirement benefits, the requirements of the Internal Revenue Code or ERISA, the provisions of a contract or a policy involving an insurance company or *any other reason*. A Plan change may transfer Plan assets and liabilities to another Plan or split a Plan into two or more parts. If the Company does make a change or ends a Plan, it may decide to set up a different Plan providing similar or identical benefits.

(emphasis added).

On November 3, 1992, Unisys announced that effective January 1, 1993, it was terminating all of its existing medical plans. Under the new plan, retirees were responsible for increasing levels of contribution until January 1, 1996, after which they were required to pay the full cost of their coverage under the plan. The district court explained the reasons for this decision as follows:

> Unisys' 1992 decision to replace all pre-existing plans with the Unisys Post-Retirement and Extended Disability Plan ("the new plan") was the product of a number of factors. It was prompted in part by the issuance of Financial Accounting Standards Board Statement No. 106 ("FAS 106"), which would have created a large liability on Unisys' financial statements. [Citation omitted]. Unisys also terminated the old plans because of escalating medical costs and administrative costs of maintaining many different plans.

(Pet. App. 61a) (citing *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, MDL No. 969, 1994 WL 284079, at *3 (E.D. Pa. June 24, 1994)).

Unisys' decision to terminate its retiree medical benefit plans was challenged in nine separate actions, which the Judicial Panel on Multidistrict Litigation transferred to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1407. The retirees asserted three types of claims against Unisys under ERISA—violation of the terms of the applicable benefit plans, breach of fiduciary duty, and estoppel. On June 10, 1993, the district court, pursuant to a stipulation by the parties, issued a class certification order invoking Federal Rule of Civil Procedure 23(b)(2). The district court divided the retirees' claims into subclasses based upon the plan applicable to the retiree upon retirement. Specifically, the district court created three subclasses of retirees: (1) those who retired under the Burroughs plans (the "Burroughs class"); (2) those who retired under the Sperry plans (the "Sperry class"); and (3) those who retired under the Unisys plans (the "Unisys class"). The court further divided these subclasses by reference to whether the retiree had retired pursuant to an early retirement program ("early retirees") or had retired in the normal course ("regular retirees").

Prior to trial, the district court granted Unisys' motion for partial summary judgment on all claims of the Unisys and Burroughs regular retirees and on the estoppel and breach of fiduciary duty claims of the Sperry regular retirees. *See In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 837 F. Supp. 670 (E.D. Pa. 1993). The district court denied Unisys' motion, however, with respect to the claims of the Sperry regular retirees under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), that they were entitled to vested medical benefits under the terms of the governing plans. *Id.* at 680. Consequently, those claims, as well as all of the claims of the early retirees, were tried before the district court in 1994. *See In re Unisys*, 1994 WL 284079.

Following the trial, the district court concluded that the Sperry regular retirees had failed to establish that they were entitled to vested medical benefits under the terms of the plans. *See id.* at *34. Nonetheless, in response to a motion for reconsideration made at trial, the district court reinstated the breach of fiduciary duty claims of the Sperry regular retirees, claims on which Unisys had been granted summary judgment earlier in the case. *Id.* at **26-27. In support of its conclusion that the Sperry regular retirees should be permitted to pursue their breach of fiduciary duty claims, the district court relied on a decision of the court of appeals issued during the course of trial, *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund,* 12 F.3d 1292 (3d Cir. 1993). *Id.* at **25-26.[2]

On appeal,[3] the court of appeals held that the Sperry regular retirees were not entitled to vested medical benefits under the terms of the applicable plans "due to the unambiguous language of the reservation of rights clauses." *Unisys I*, 58 F.3d at 907. The court of appeals "accept[ed] Unisys' contention that at the time lifetime benefits were promised, no one at Sperry ever intended or anticipated that there would one day be the need to reduce or eliminate retiree medical benefits." *Unisys II*, 57 F.3d at 1265 n.15. It did not disturb the district court's finding that there was no evidence of fraud or bad faith on the part of the company. Moreover,

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[2] The district court also entered judgment in Unisys' favor on the claims of the Unisys early retirees. The claims of the Sperry and Burroughs early retirees were settled after trial, but before the district court issued its decision on the merits.

[3] The court of appeals has published three opinions in this matter. *See In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 58 F.3d 896 (3d Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996) ("*Unisys I*"); *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 57 F.3d 1255 (3d Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996) ("*Unisys II*"); *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 242 F.3d 497 (3d Cir. 2001) ("*Unisys III*").

in rejecting the Sperry regular retirees' plan-based and estoppel claims, the court of appeals held that the retirees' interpretation that they were "promised vested benefits" was unreasonable as a matter of law "because it cannot be reconciled with the unqualified reservation of rights clauses in the plans." *Unisys I*, 58 F.3d at 907.

Nevertheless, the court of appeals affirmed the district court's decision to reinstate the breach of fiduciary duty claims of the Sperry regular retirees. *Unisys II*, 57 F.3d at 1266-67. In reaching this conclusion, the court of appeals focused on Unisys' use of the terms "lifetime" or "for life" in some of its informal communications with plan participants to describe the duration of retiree medical coverage. *Id.* Although this description was completely consistent with the "lifetime" durational provision in the applicable summary plan descriptions, the court of appeals concluded that these alleged "lifetime" statements could amount to "material misrepresentations" regarding retiree medical coverage because they were not coupled with a reiteration of the reservation of rights appearing in the plan document stating that the plans could be amended or terminated. *Unisys II*, 57 F.3d at 1266-67. Relying on evidence that Sperry had knowledge that some plan participants were confused as to whether their benefits could be modified once they retired, the court of appeals held that the company had an obligation to "correct the misinformation" by advising plan participants of what had already been disclosed to them in their summary plan descriptions—that their "lifetime" medical benefits were subject to amendment or termination. *Unisys II*, 57 F.3d at 1266. Thereafter, the district court reinstated the breach of fiduciary duty claims of the Burroughs and Unisys regular retirees. *See In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, MDL No. 969, 1996 WL 455968, at *6 (E.D. Pa. Aug. 13, 1996).

The Proceedings And Decision In The District Court

In August 1996, Unisys moved for summary judgment on the breach of fiduciary duty claims of certain groups of Sperry and Burroughs retirees, in part on the basis that their claims were time-barred under the time periods set forth in Section 413 of ERISA. Section 413 provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation . . . after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

On March 10, 1997, the district court granted Unisys' motion for summary judgment on the claims of the Burroughs and Sperry plaintiffs who retired more than six years before the filing of their breach of fiduciary duty claims, on the ground that these claims were barred by Section 413.[4] Specifically, the court found that "the last action which constituted part of the breach" of fiduciary duty—that begins the running of the statute of repose under the terms of Section 413—"was complete on the date that [the] employee chose to

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[4] The district court also granted Unisys' motion for summary judgment on the claims of those retirees who were involuntarily terminated from Unisys. (Pet. App. 83a).

retire." (Pet. App. 66a). The court reasoned that "[t]he last misrepresentation about 'for life' benefits which could have affected an employee's decision to retire must have occurred on or before the date the employee retired." (Pet. App. 66a). Accordingly, the court held that the claims of any retiree who retired from Unisys more than six years prior to the filing of this lawsuit were excluded by the statute of repose.[5]

In so holding, the district court rejected the retirees' contention that their claims were governed by the more lenient "fraud or concealment" provision of Section 413. Specifically, the court rejected the retirees' argument that the alleged "misrepresentations" about the lifetime character of the benefits were "self-concealing" and therefore justified the extension of the statute of repose. (Pet. App. 56a-62a). The court held that the "fraud or concealment" provision applies not merely when the alleged breach itself "sounds in concealment," but only when a plaintiff proves "that the defendant took *affirmative steps* to hide its breach of fiduciary duty." (Pet. App. 56a-57a) (emphasis in original). In other words, there "must be actual concealment—*i.e.*, some trick or contrivance intended to exclude suspicion and prevent inquiry." (Pet. App. 58a).

The district court concluded that in opposing Unisys' well-supported motion for summary judgment, the retirees had failed to come forward with any evidence of fraud or concealment. To the contrary, the court stated: "this court will not hold that the truth about 'lifetime' benefits was concealed from participants when the information about the reservation of rights clause was unambiguously printed and

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[5] The district court rejected the retirees' argument that the "last action which constituted part of the breach" was Unisys' 1992 decision to terminate its retiree medical benefit plans. In fact, the district court observed that the termination of the plan was a lawful, nonfiduciary act that had no bearing on Unisys' alleged breach of fiduciary duty. (Pet. App. 67a).

distributed in the SPD." (Pet. App. 58a-59a).[6] It also rejected the retirees' contention that there was a factual dispute regarding the allegations of fraud, finding that the kinds of evidence to which the retirees pointed "reveal[ed] no trick, contrivance, or intent to deceive the plaintiffs about the existence of the published reservation of rights clause." (Pet. App. 69a). The court also noted that the retirees' failure to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b) "support[ed] its decision on the merits." (Pet. App. 56a n.8).

The retirees sought certification of the district court's partial final judgment under Federal Rule of Civil Procedure 54(b). Over the objection of Unisys, the district court granted that motion on September 22, 1999. *In re Unisys Retiree Med. Ben. ERISA Litig.*, 189 F.R.D. 149, 152-53 (E.D. Pa. 1999).

The Court Of Appeals' Decision

The court of appeals affirmed the district court's threshold legal holding that the "fraud or concealment" provision of Section 413 applies only where a plaintiff can demonstrate that the defendant took "affirmative acts" to conceal its alleged breach.[7] Specifically, it held that "[t]he issue is not

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[6] The court also reiterated its prior factual findings that: (1) there were no substantiated allegations of fraud or bad faith on Unisys' part; and (2) Unisys' 1992 decision to terminate the old Plans was motivated by the creation of Financial Accounting Standard 106 as well as escalating medical and administrative costs. (Pet. App. 61a) (citing *In re Unisys*, 1994 WL 284079, at *3).

[7] In their Petition for a Writ of Certiorari, the retirees maintain that the overwhelming authority of ERISA caselaw requiring "affirmative acts" in order to invoke Section 413(2)'s "fraud or concealment" provision stems from a "persistent misreading of this Court's holding in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879), and a disregard of the clear teachings of *Bailey v. Glover*, 88 U.S. (21 Wall) 342 (1874) . . ." (Pl. Petition p. 11). As an initial matter, both *Bailey* and *Wood* interpreted

whether the complaint 'sounds in concealment' [*i.e.*, not whether Unisys misadvised the retirees or counseled them without drawing attention to the reservation of rights clause], but rather whether there is evidence that the defendant took affirmative steps [at any point] to hide its breach of fiduciary duty." (Pet. App. 12a) (brackets in original) (quotation and citation omitted). The court of appeals, accordingly, agreed with the district court that the retirees could not invoke the more lenient "fraud or concealment" limitations period based solely upon evidence supporting the alleged breach of fiduciary duty. It also recognized that Unisys' distribution of an unambiguous SPD explaining its right to modify or terminate the plan was generally inconsistent with a finding of fraud or concealment. (Pet. App. 10a-16a).[8]

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common law fraud or concealment provisions, and while the common law may inform the federal courts' analysis of ERISA provisions, it in no way determines a fiduciary's duties under ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Moreover, the retirees fail to explain why Congress, when enacting ERISA in 1974, should be presumed to have been aware of what class counsel claims is the "correct" reading of *Bailey* despite the almost 100 years of caselaw interpreting *Wood* as requiring "affirmative acts" to prove fraud or concealment. In short, there is no reason for this Court to supplant the decades of ERISA caselaw interpreting the exact statutory provision at issue herein based upon vague and inaccurate concepts from the common law of trusts and common law cases relating to equitable tolling and fraud.

[8] The retirees also maintain in their Petition that the "last act constituting part of the breach" for purposes of Section 413 was Unisys' 1992 decision to terminate its retiree medical benefit plans. Like the district court, the court of appeals held that Unisys' lawful, nonfiduciary act of terminating the plans could not be the "last action" under Section 413. (Pet. App. 20a). Indeed, the retirees' argument ignores the unique structure of their breach of fiduciary duty claims—specifically, that Unisys, although retaining the right to terminate the plans, misrepresented the *nature of the right* to the retirees. As both courts below correctly acknowledged, such alleged misrepresentations cannot be said to have "resulted" in the termination of the plans. (Pet. App. 20a, 67a-68a).

Nevertheless, the court of appeals reversed the grant of summary judgment because it was "unwilling to say based on the current record that *no* retiree will be able to successfully invoke the 'fraud or concealment' provision of Section 1113(2)."[9] (Pet. App. 16a) (emphasis added). The court pointed to one piece of evidence—testimony by a retirement counselor that he advised some potential *early* retirees that the reservation of rights clause applied only to active employees—that it believed would satisfy the "affirmative acts" requirement of Section 413 as it applies to *regular* retirees. The court stated:

> It seems to us entirely possible that evidence of this character might well bring the fraud or concealment provision into play. If, for example, advice about the reservation of rights clause was given under circumstances such that an employee, who had consulted the SPD, was dissuaded from consulting counsel regarding that clause, we believe that the advice could appropriately be regarded as an affirmative step having the effect of concealing Unisys' breach.

(Pet. App. 16a-17a).

Without citation to any other evidence, the court of appeals concluded that the grant of summary judgment on the claims of all regular retirees who retired more than six years before the class action was filed must be reversed as to all such retirees because "there may be retirees who will be able to prove that Unisys counselors concealed their breach from them." (Pet. App. 17a). In short, on the basis of speculation

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Accordingly, that termination cannot be the "last action which constituted part of the breach" under Section 413. (Pet. App. 20a, 67a-68a).

[9] The court of appeals did not address Unisys' contention that the retirees could not extend the limitations period under Section 413 by invoking the "fraud or concealment" provision because they had failed to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

as to what facts some retirees might attempt to prove, the court of appeals reversed the grant of summary judgment as to all.

REASONS FOR GRANTING THE PETITION

The retirees have filed a Petition for a Writ of Certiorari, requesting that this Court review two issues relating to the appropriate interpretation of the "last act" and "fraud or concealment" provisions of ERISA Section 413. While Unisys maintains that the court of appeals erred in interpreting the provisions of both ERISA Section 413 and ERISA Section 502(a)(3), Unisys initially did not file a Petition for a Writ of Certiorari with this Court because that decision has only compounded the case-specific issues to be decided by the district court in evaluating whether the claims of the retirees can survive summary judgment. Although Unisys believes that this Court may ultimately need to review this case to clarify the appropriate parameters of ERISA's breach of fiduciary duty and statute of limitations provisions, such review is premature given the undeveloped state of the factual record related to the retirees' breach of fiduciary duty claims. However, should this Court grant the retirees' Petition for a Writ of Certiorari, it should also review the question presented by this Cross-Petition, as it is inextricably tied to the question presented by the retirees' Petition relating to the "fraud or concealment" provision of ERISA Section 413.

Specifically, the decision below raises critical issues about whether and to what extent the class action device should be permitted to alter or trump the Federal Rules of Civil Procedure regarding summary judgment and the pleading requirements for fraud. Unisys respectfully submits that the court of appeals made a fundamental error in deviating from the well-established framework of Rule 56, as set forth in the decisions of this Court, by permitting all plaintiffs to overcome summary judgment without requiring them to adduce any "specific facts" regarding whether Unisys

fraudulently concealed its alleged breach *from each of them*. The court of appeals also failed to enforce the clear pleading requirement set forth in Federal Rule of Civil Procedure 9(b). Despite the plain mandate that allegations of fraud be "pled with particularity," and the utter lack of any particular fraud allegations in the retirees' Complaints, the court of appeals improperly failed to dispose of any of the plaintiffs' claims of "fraud or concealment" on this basis. The decision below ". . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

A. Review Should Be Granted Because The Court Of Appeals' Decision Conflicts With The Rulings Of This Court That, To Avoid Summary Judgment, The Record Must Demonstrate "Specific Facts Showing That There Is A Genuine Issue For Trial" As To Each Plaintiff.

In the context of any joinder mechanism other than Federal Rule of Civil Procedure 23, the court of appeals' decision would be plainly contrary to the express language of Rule 56 of Federal Rules of Civil Procedure and the summary judgment jurisprudence of this Court. In overturning summary judgment on Section 413's statute of repose, the court of appeals discarded Rule 56's requirement that a plaintiff opposing a well-supported motion for summary judgment based on the record must set forth "*specific facts* showing that there is a *genuine* issue for trial in order to overcome summary judgment." *See* Fed. R. Civ. P. 56(e) (emphasis added). Instead, the court of appeals permitted all plaintiffs to overcome summary judgment on retiree-specific elements of their claims by relying upon evidence applicable—if at all—only to a select number of class members. The court of appeals thus relieved class plaintiffs from the obligation to carry the same burden as other plaintiffs in opposing summary judgment motions.

The basic requirements of Rule 56 are well established. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In this trilogy of opinions, the Court held that once the moving party satisfies its burden of demonstrating the absence of a genuine issue of material fact in the record, summary judgment must be granted unless the nonmoving party meets its burden of showing—through evidence capable of being put into admissible form—that there is a disputed issue of material fact. *See Matsushita*, 475 U.S. at 585-86; Fed. R. Civ. P. 56(e). The nonmoving party's burden in avoiding summary judgment at this stage is genuine. The nonmoving party may not rely on unsupported assertions, conclusory allegations, or mere suspicions to oppose a motion for summary judgment. *See Liberty Lobby*, 477 U.S. at 256; *see also Matsushita*, 475 U.S. at 586 (party opposing summary judgment "must do more than show there is some metaphysical doubt as to the material facts.").

This Court repeatedly has emphasized the importance of Rule 56 and summary judgment. Summary judgment serves the critical purpose of conserving time and resources by assessing whether there is a "genuine need for trial" and disposing of factually unsupported claims or defenses before trial. *Matsushita*, 475 U.S. at 586 (the purpose of summary judgment is to "pierce the pleadings and to assess proof in order to see whether there is a genuine need for trial.") (quoting Advisory Committee Note to 1963 Amendment of Fed. R. Civ. P. 56(e), 28 U.S.C. App. p. 626); *Celotex Corp.*, 477 U.S. at 323 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.").

In the decision below, the court of appeals ruled that to successfully invoke the fraud or concealment provision of Section 413, an individual retiree must prove: (1) that he consulted the SPD; (2) that he was given advice about the reservation of rights clause; and (3) that that advice dissuaded him from consulting counsel regarding the clause. (Pet. App. 16a). Nevertheless, in direct contravention of the express requirements of Rule 56 and this Court's summary judgment decisions, the court of appeals did not require each plaintiff to set forth "specific facts" demonstrating a genuine issue for trial as to whether he could meet this test. Instead, creating an exception for the class action context in which these claims were presented, the court of appeals allowed every plaintiff to avoid summary judgment on the basis of "evidence" that a Unisys counselor told some unidentified employees that the reservation of rights clause only applied to active employees. Specifically, the court of appeals pointed to a statement by the district court referring to "evidence suggesting that a 'retirement counselor [had] responded to questions about the reservation of rights clause raised by potential retirees by saying that the language pertained to active employees and not to retirees.'" (Pet. App. 16a) (quoting *In re Unisys*, 1994 WL 284079, at *34 n.69). The court of appeals did not attempt to connect this evidence to any of the retirees whose claims were before it in the instant appeal.[10] Nevertheless, from this sole piece of evidence, the court of appeals concluded that "there may be retirees who

[10] Specifically, the district court cited counselor Roy Hain's testimony that he told potential retirees that the language of the SPD pertained to active employees. *In re Unisys*, 1994 WL 284079, at *34 n.69. A review of the relevant portion of the trial transcript reveals that Hain claims to have made these statements to *early* retirees. Notably, the claims of all of the Sperry and Burroughs early retirees were settled in 1994 and were not before the court of appeals. This illustrates the danger in permitting parties to overcome summary judgment without adducing "specific facts" in support of their position.

will be able to prove that Unisys counselors concealed their breach from them." (Pet. App. 17a). The court of appeals' reliance on whether there "may be" retirees who can prove the existence of a genuine issue of material fact does not even approach the appropriate standard of whether each retiree has come forth with "specific facts" showing that there is a genuine issue of material fact.

This use of the class action vehicle to weaken the requirements of Rule 56 directly conflicts with the summary judgment framework mandated by this Court. *See Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477 U.S. at 323; *Matsushita*, 475 U.S. at 586. Nothing in the Federal Rules of Civil Procedure permits a plaintiff whose claims have been certified for class adjudication pursuant to Rule 23 to circumvent the express requirements of Rule 56. Where appropriate, the Federal Rules explicitly provide exceptions for cases certified as class actions under Rule 23. *See* Fed. R. Civ. P. 19(d) ("[t]his rule is subject to the provisions of Rule 23"); Fed. R. Civ. P. 41(a)(1) ("[s]ubject to the provisions of Rule 23(e) . . . an action may be dismissed . . ."). Rule 56, however, contains no such exception. To the contrary, when a party files a well-supported motion for summary judgment, Rule 56 speaks of the burden on the *"adverse party"* to set forth specific facts showing a genuine issue for trial. *See* Fed. R. Civ. P. 56(e). It makes no distinction based on whether the adverse party's claim is asserted in a class action, as opposed to individual, context.

The failure of the court of appeals to follow the clear direction of *Celotex, Matsushita,* and *Liberty Lobby* should be addressed by this Court. The decision below threatens the uniformity of application of Rule 56, which is essential to the continued efficient disposition of unsupported claims on motions for summary judgment. Furthermore, the relaxation of the requirements of Rule 56 in the class context effectively allows a plaintiff to avoid satisfying his burden on summary

judgment simply because his claim is being asserted in a class action. Consequently, should this Court grant the retirees' Petition for a Writ of Certiorari, it also should grant Unisys' Cross-Petition to prevent such evasion of the requirements of Rule 56.

B. Review Should Be Granted Because The Court Of Appeals' Decision Conflicts With The Rulings Of This Court And Other Federal Courts Of Appeals That Federal Rule Of Civil Procedure 9(b) Requires Plaintiffs To Plead Fraud With Particularity.

In further disregard of the Federal Rules of Civil Procedure, the court of appeals improperly permitted the retirees to invoke the fraud or concealment provision of Section 413 despite their failure to plead fraud with particularity as required by Rule 9(b).[11] The court's refusal to enforce Rule 9(b) is inconsistent with both the plain language of the Rule and the decisions of other courts of appeals.[12]

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[11] Pleading fraud "with particularity" requires that a plaintiff "allege with particularity the defendant's acts which the plaintiff contends amount to fraud." *Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1988). Rule 9(b)'s pleading requirement typically requires that a plaintiff, at a minimum, state the date, time, speaker, place, and content of the alleged fraud. *IUE AFL-CIO Pen. Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993); *see Losquadro v. FGH Realty Credit Corp.*, 959 F. Supp. 152 (E.D.N.Y. 1997); *Caputo v. Pfizer*, 89 F. Supp. 2d 237, 240 (D. Conn. 2000); *Kirk v. Liberty Mut. Ins. Co.*, 28 F. Supp. 2d 696, 700 (D. Conn. 1998); *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906, 913 (S.D. Ga. 1990). *See generally Armstrong v. McAlpin*, 699 F.2d 79, 88-89 (2d Cir. 1983) ("generalized and conclusory allegations of fraudulent concealment do not satisfy the requirements of Federal Rule of Civil Procedure 9(b)."). Here, the retirees' various Complaints provided no particular allegations of fraud by Unisys.

[12] Unlike the court of appeals, the district court acknowledged that the retirees' failure to plead fraud with particularity barred their reliance on the fraud or concealment provision of Section 413. Although the court

This Court should hear this case to reassert the vitality of Rule 9(b) in ERISA breach of fiduciary duty cases, and to clarify that individual claims of fraud must be pled with particularity in all instances.

Federal Rule of Civil Procedure 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). *See Rotella v. Wood*, 528 U.S. 549, 560 (2000) (fraud must be pleaded "with particularity"). Rule 9(b) serves the important purposes of "alerting defendants to the precise misconduct with which they are charged" and "protecting defendants against spurious charges of immoral and fraudulent behavior." *Durham v. Bus. Mgmt. Assoc.*, 847 F.2d 1505, 1511 (11th Cir. 1988); *see also Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990) (primary purpose of Rule 9(b) is to "afford defendant fair notice of plaintiff's claim and the factual ground upon which it is based.").

The court of appeals' failure to apply the requirements of Rule 9(b) is squarely at odds with the decisions of other courts of appeals. In considering the application of Section 413's "fraud or concealment" provision, other courts of appeals have required that plaintiffs plead fraud with particularity pursuant to Rule 9(b). *See J. Geils Band Employee Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1256 (1st Cir.) *cert. denied*, 519 U.S. 823 (1996) ("It is Appellants' burden under Federal Rule of Civil Procedure

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disposed of the issue "on the merits" by determining that the retirees could not establish "fraud or concealment," the court also stated that the "lack of specificity as to the [plaintiffs'] fraud allegations supports [the] decision on the merits." (Pet. App. 56a). Unisys argued this issue in the court of appeals, as a basis for affirming the judgment of the district court. *See* Brief for Appellee Unisys Corporation, at pp. 44-45. Nevertheless, the court of appeals ignored the pleading requirements of Rule 9(b), instead permitting the retirees to overcome summary judgment without even mentioning their failure to plead fraud with particularity.

9(b) to plead with particularity the facts giving rise to the fraudulent concealment claim."); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994) (to invoke fraud or concealment provision, a plaintiff must comply with the requirements of Federal Rule of Civil Procedure 9(b)); *Ternes v. Tern-fam, Inc.*, 904 F.2d 708, 1990 WL 80915 (6th Cir. 1990) (noting that plaintiff had failed to allege fraud or concealment in his complaint); *see also Fiene v. V&J Foods, Inc.*, 962 F. Supp. 1172, 1184 (E.D. Wis. 1997) (holding that plaintiff had failed to plead fraud in his initial complaint as required by Federal Rule 9(b) and stating that "a plaintiff cannot put off making particularized allegations of fraud until summary judgment," because that would defeat the purpose of Rule 9(b)); *Cramer v. Hartford Hosp.*, No. 3:96CV217, 1996 WL 732552, at *4 (D. Conn. Dec. 6, 1996) (plaintiffs failed to meet "stringent" requirements of Rule 9(b), and thus could not invoke fraud or concealment provision of Section 413; "mere use of word 'fraud' to describe defendants' conduct falls woefully short.").

The court of appeals' holding departs significantly from Rule 9(b) and the numerous decisions applying that Rule to ERISA Section 413's fraud or concealment provision. The court of appeals simply disregarded the well-considered decision of this Court in its rulemaking role to require fraud to be pled with particularity. *See Mistretta v. United States*, 488 U.S. 361, 388 (1989) ("Congress expressly has authorized this Court to . . . prescribe rules of procedure for lower federal courts in . . . civil cases.") The error of this approach is compounded by the court of appeals' improper application of Rule 56. Taken together, these decisions have the remarkable and untenable effect of permitting all of the retirees to avoid pretrial application of the statute of repose without ever setting forth the basis for their individual allegations of "fraud or concealment"—allegations that must be proved if the claims are not to be barred. Accordingly, should this Court grant the retirees' Petition for a Writ of

Certiorari, it also should grant Unisys' Cross-Petition to prevent use of the class action device as a means of circumventing the salutary requirements of Rule 9(b).

CONCLUSION

If this Court grants the retirees' Petition for a Writ of Certiorari, Unisys' Cross-Petition for a Writ of Certiorari also should be granted.

Respectfully submitted,

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